No. 3716

IN THE

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLARA J. CURTIS,

Plaintiff in Error,

vs.

THE NORTH AMERICAN INDIAN, INC., a corporation, E. S. PEGRAM and GUTSON BORGLUM,

Defendants in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Plaintiff in Error

JOHN G. BARNES,
Attorney for Plaintiff in Error.

507 Marion Building,
Seattle, Washington.

PRESS OF PLINY L. ALLEN CO., SEATTLE

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STATEMENT OF THE CASE.

On the 19th day of April, 1920, defendant in error, The North American Indian, Inc., filed a complaint in the United States District Court for the Western District of Washington, Northern Division, against

Edward S. Curtis, and Clara J. Curtis, formerly husband and wife, as defendants.

It is alleged in the complaint that the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business in New York City. That until within the last year defendants were husband and wife, doing business as Curtis Studio. That the defendants were wrongfully and unlawfully in possession of a large amount of personal property belonging to the plaintiff, and denied the right of possession to plaintiff, and wrongfully and unlawfully held possession of said property notwithstanding the plaintiff had demanded possession thereof.

The property was described as being:

> 1 motion picture re-wind; 2 boxes of lantern slides; 1 net; 2 boxes of phonograph records; 1 camp equipment; 1 box containing clippings, articles and reviews of the North American Indian; 1 Indian saddle; 1 phonograph; two bundles of 3 tents each; 1 tripod; a large cabinet full of reviews of North American Indian; large assortment of motion picture materials and flash powder; 1 typewriter case; 1 box containing records, maps and field material; 1 box containing Indian costume material; 1 box containing Indian reports and files; a large assortment of Indian negatives, transparencies; records and manuscript; 1 box containing Indian clippings with manuscript descriptive thereof; 1 box containing Indian tents and camp equipment; large assortment of Indian reviews; 1 large assortment of portfolios and books of North American

Indian; 4 bookcases and contents; large assortment of Indian baskets; pottery, Indian blankets and Indian curios.

That the property was worth the sum of Ten Thousand Dollars, and that defendants refused to deliver possession to plaintiff. That by reason of the wrongful withholding of possession of the property plaintiff had been damaged in the sum of Five Thousand Dollars, and would suffer other and greater damage. That the property had not been taken by defendants for a tax, assessment or fine pursuant to the statute, or seized under execution or attachment against the property of plaintiff. The prayer is for judgment against the defendants, and each of them, "for the recovery of the possession of the said personal property, and in case possession thereof cannot be had, then, for judgment against the defendants in the sum of $10,000.00, the value thereof", $5,000.00 damages for wrongfully withholding possession, and for costs and disbursements.

The complaint is verified by the affidavit of E. A. Wright who states therein that the plaintiff is a corporation organized under the laws of the State of New York, that there is no office within the State of Washington, and that, as its attorney, he was authorized to make the verification on behalf of plaintiff, because it was not within the State of Washington.

A summons was issued which was never served on the defendant Edward S. Curtis, and was served on plaintiff in error on the 28th day of April, 1920.

Simultaneously with the filing of the complaint and issuance of summons said E. A. Wright, as attorney for the plaintiff corporation, filed his affidavit in the court and cause, in which the property is described the same as in the complaint, but its location, either city, county, state or district, is not given, or referred to in any manner. Otherwise the affidavit contains the averments required by section 708 of Remington's Code of Washington. With the affidavit there was also filed in the court and cause a bond in the sum of Twenty Thousand Dollars, and application made to the court to order the issuance of a writ of replevin. Thereupon, and on said 19th day of April, the judge indorsed upon the bond his approval thereof, and made and entered an order in the case that

> "it appearing from the plaintiff's complaint on file and the affidavit in support thereof, that the cause of action for replevin is stated therein, and it further appearing that the plaintiff has furnished good and sufficient bond to the defendants in this action, now therefore, it is hereby ordered that writ of replevin issue in this action directed to the marshal to take possession of the property."

In pursuance of said order the clerk immediately issued a writ of replevin.

On the 21st day of April, 1920, the Marshal filed the writ of replevin in the court and cause, with his return attached thereto.

Proceeding in accordance with rule 22 of the

District Court, plaintiff in error appeared specially and moved the Court to dismiss the action:

1. Because neither the residence, nor citizenship, of the defendants was alleged in the complaint, and therefore, no diversity of citizenship to give the Court jurisdiction; 2. To quash and annul the writ of replevin for the reason that the Court was wholly without jurisdiction to issue said writ; 3. To quash and annul the execution of the writ of replevin by the Marshal, and to order him to forthwith return all the property he took under the writ to the place from whence he took it, for the reasons that the affidavit did not allege the location of the property described therein to be within the jurisdiction of the court; that the bond was not filed with the marshal, or ever approved by him, and that no service of the affidavit or bond had ever been made upon her.

The motions were heard on the 17th day of May, 1920. The Court permitted counsel to amend the complaint by interlineation so that it would show residence of defendants, and denied the motion to quash the writ of replevin, and its execution by the marshal, to which rulings plaintiff in error took exceptions and the same were embodied in the signed order of the court.

Plaintiff in error answered the complaint by specifically denying each and every of the allegations therein, and the whole thereof, excepting only the allegation that the property described therein was worth the sum of Ten Thousand Dollars, which was expressly admitted to be true, and the allegation

that the property had not been taken by defendants for a tax, etc., as to which nothing was said.

The defendant Edward S. Curtis appeared voluntarily, and in his answer to the complaint denied that he was wrongfully or unlawfully in possession of the property described in the complaint, which he expressly admitted belonged to, and was owned by the plaintiff, and denied that he wrongfully, or unlawfully held possession thereof. Denied that the property described was worth the sum of Ten Thousand Dollars, and that plaintiff had been damaged in any sum by the withholding of possession of the property.

The cause was tried to the Court and a jury on the 5th day of November, 1920. The defendant Edward S. Curtis appeared in court in person, and by attorney, but neither of them took any part in the trial, excepting that Edward S. Curtis voluntarily offered himself as a witness for plaintiff, and his attorney was called as a witness to identify the signature to plaintiff's Exhibit 14.

Lewis Albert, called as a witness for plaintiff, testified that he was, and for about ten years had been, the office manager of the plaintiff corporation. He identified the signatures of Edward S. Curtis, Robert C. Morris and F. Gordon Brown upon plaintiff's Exhibit 1, which was admitted in evidence. This exhibit is an agreement dated December 21st, 1909, between Edward S. Curtis and the North American Indian, a corporation, in which it is recited that Curtis has for many years theretofore

been engaged in the publication of a work known as The North American Indian, and desires to incorporate said business, and the corporation desires to acquire and henceforth conduct the same, and that in the opinion of the board of directors of the corporation the fair value of the business to the corporation is equal to the sum of $50,000.00, in consideration of one dollar paid by each of the parties tc the other, and of the mutual promises therein contained, Curtis "hereby sells, transfers, assigns and sets over unto the copporation the said business heretofore conducted by him in the publication of the said "The North American Indian", and all the property and assets of every name and nature employed in connection therewith, including all copyrights, subscription rights, publications and material for publication, plates, prints and printed books, illustrations and material of every name, including choses in action and rights of action; but subject to all liabilities in respect of such business, which the vendor covenants are fully and truly set forth in the Schedules A, B and C hereunto annexed and forming part of this agreement." In consideration of the issue to him of 590 shares of the preferred stock of the corporation, Curtis agrees to pay into the treasury of the corporation the sum of $59,000.00 in money. The corporation accepts the transfer of said business at the price of $50,000.00, and accepts the subscription of Curtis for 590 shares of the preferred stock of the corporation at par, and in consideration of the transfer of the business, and the

payment of the $59,000.00 in money, the corporation will forthwith issue to Curtis five hundred shares of the common stock of the corporation, and five hundred and ninety shares of the preferred stock; all of the stock to be fully paid and non-assessable. The witness identified the signatures to, and over the objections of plaintiff in error, duly excepted to, plaintiff's Exhibits 2, 3, 4, 5, 6, and 7,—all being assignments of copyrights from Edward S. Curtis to The North American Indian, were admitted in evidence. Over the objection and exception of plaintiff in error there was also admitted in evidence plaintiff's Exhibit 9,—a certified copy of plaintiff's Exhibits 2 and 3; Exhibit 10,—consisting of eleven volumes of the work called North American Indian; Exhibit 11, —consisting of eleven portfolios of plates; Exhibit 12,—the original writ of replevin with the marshal's returns attached; Exhibit 13,—a letter dated Seattle, April 9th, 1920, written by John G. Barnes, as attorney for Clara J. Curtis, to Edward S. Pegram, New York City; Exhibit 14,—letter dated New York, July 7, 1919, written by J. W. Bryan as attorney for Clara J. Curtis, to Edward S. Pegram, New York City. Over the objection and exception of plaintiff in error, plaintiff's Exhibit 15 was admitted in evidence. It consists of two papers—one a notice and tax receipt, and the other a certificate of the Secretary of State of the State of New York that certificate of incorporation of North American Indian was filed in his office on December 18, 1909.

W. Albee, called as a witness for plaintiff, over

the objections and exceptions of plaintiff in error, testified that he had been appointed by His Honor so to do, and had to the best of his ability carried out the order of the Court, and made a check of the various assignments of copyrights shown by plaintiffs Exhibits 1, 2, 3, 4, 5 and 6, and other data, with the negatives at that time in room 64 of the Cobb Building. That he began the work of such checking in the latter part of July, or first part of August, 1920. That in addition to the negatives checked by him there was at the time in said room a "sort of heterogenous mass of material." That it was impossible for him to say how many negatives there were in the room, nor did he know how many he had segregated.

Agnes Shortall, called by the plaintiff testified that she was employed at the Curtis Studio, but not by Mrs. Curtis, for a year and a half, beginning January 1st., 1919. Over the objections and exceptions of plaintiff in error she was permitted to testify that there was in the Curtis Studio while she was there, Indian negatives, baskets, volumes and portfolios, and the common understanding around the studio was that they all belonged to the North American Indian.

B. S. Patten, called as a witness by the plaintiff, testified that he was engaged at the studio at Fourth and University Streets for two years, ceasing his connection on the 6th day of May, 1920. Over the objections and exceptions of plaintiff in error he was permitted to testify that the property of which

the Marshal took possession was generally separated and segregated from the balance of the property in the studio. That it was the common understanding around the studio that it was the property of The North American Indian, the plaintiff in this case. That about three or four weeks before the goods were replevined Mr. Wright, representing the plaintiff, came to the studio and said to Miss Beth Curtis, who was the manager of the studio: "I am representing the North American Indian, and they instructed me to come and get their property." He simply said: "I come up here and want this property. It belongs to the North American Indian." That at that time witness did not know, and no one knew positively, all of the property of the North American Indian. That when Mr. Wright made the demand on Miss Curtis she called the witness and asked him what they should do about it. That the witness told Mr. Wright that so far as he was concerned he could not have the property.

Edward S. Curtis, the defendant, called as a witness on behalf of plaintiff, testified that on the 21st day of December, 1909, he was married to Clara J. Curtis, the other defendant. That at the time plaintiff's Exhibit 1 was executed "the material" was in the Curtis Stuido, in the Downs Block on Second Avenue, in Seattle, King County Washington. That he was a resident of Seattle at that time, and at the time the action was instituted. That he was familiar with the property the marshal seized in this action. That with the exception of a bundle of neg-

atives, about thirty in number, of different members of the Roosevelt family; an old broken mimeograph of practically no value; a box containing a fish net of the value of a couple of dollars; a bundle of burlap of perhaps two or three dollars; a box of old cancelled checks, of no value; some old portrait proofs of no value, and four or five negatives of people not Indians, it is the property of the plaintiff North American Indian. That this was all given from his recollection of some months ago, and that there might be odds and ends of negatives in all those thousands of negatives in room 64 of the Cobb Building which he did not see.

Thereupon the plaintiff rested.

Plaintiff in error introduced in evidence, and read into the record sections 35 and 37 of the general corporation law of the State of New York. Section 35 provides that upon the dissolution of a corporation its directors shall be the trustees of its creditors and stockholders, with full power to settle its affairs, and with authority, by their name as such trustees, to sue for and recover the debts and property of the corporation. Section 37 provides the method by which a domestic corporation may, at any time before the expiration thereof, extend the term of its existence beyond the time specified in its original certificate of incorporation.

Plaintiff in error also introduced in evidence a copy of the original certificate of incorporation of the North American Indian, certified and authenticated under the great seal of state of the state of

New York, by the Secretary of State of the state of New York, from which it appears that the certificate of incorporation of the North American Indian was executed in New York City, New York, by Edward S. Curtis, Robert C. Morris and F. Gordon Brown on the 16th day of December, 1909, was filed and recorded in the office of the Secretary of State of the State of New York on the 18th day of December, 1909, that the principal business office of the corporation is to be located in the Town of Ramapo, (Sterlington Post Office), Rockland County, State of New York, and that its duration is to be ten years.

Plaintiff in error recalled the witness Lewis Albert who testified that on the 18th day of August, 1920, the witness, one Robert I. Alberts and one Joseph S. Clements had executed a certificate of incorporation of The North American Indian, Inc., and caused the same to be filed in the office of the Secretary of State of the State of New York on the 23rd day of August, 1920.

Thereupon plaintiff in error rested her defense.

Whereupon the plaintiff moved the Court:

> "That your Honor direct the jury to return a verdict for the plaintiff in accordance with the demand of the complaint, excepting from the verdict the property that Mr. Curtis has indicated as exceptions that don't belong to the plaintiff; and for the sake of this motion we waive any question of damages."

Thereupon the Court asked the attorney for plaintiff in error if he desired to be heard upon the motion, and Mr. Barnes thereupon argued the motion to the Court. Upon the conclusion of his argument the Court continued the trial of the case until the 9th day of November, 1920.

When the trial was resumed on the last named day, the attorneys for plaintiff, as attorneys for petitioners, filed the petition of E. S. Pegram and Gutson Borglum in which it is set forth that the petitioners "are the sole and only directors and Trustees of The North American Indian, Inc., a corporation, the plaintiff herein, that they ask to be added as plaintiffs herein for the purpose of protecting the property and rights of the plaintiff."

The petition was verified by the affidavit of Elias A. Wright, as one of the attorneys for petitioners.

Thereupon the Court, over the objection and exception of plaintiff in error, granted the petition and signed and entered its order as follows:

> "It is hereby ordered that E. S. Pegram, a resident of the State of New York, and Gutson Borglum, a resident of the State of Connecticut, being the sole directors of the plaintiff herein, are hereby added as plaintiffs in the above action. Done in open court this 9th day of November, 1920. Edward E. Cushman, Judge."

Immediately thereupon Mr. Falknor, one of the attorneys for plaintiffs, addressing the Court said:

> "We will ask the Court to direct the jury to return a verdict as requested."

Thereupon the Court, over the objection and exception of plaintiff in error, read to, and instructed the jury to return its verdict as follows:

UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

No. 5225.

THE NORTH AMERICAN INDIAN, INC., a corporation,

Plaintiff,

vs.

E. S. PEGRAM and GUTSON BORGLUM,

Additional Plaintiffs,

vs.

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,

Defendants.

We, the jury in the above entitled cause, do hereby find that the plaintiffs are the owners of and entitled to the possession of all of the property replevined by the marshal, now located in Room 64 Cobb Building, Seattle, Washington, except the following:

No. 1. Mimeograph ..... No Value
No. 2. Three printing-frames ..... Value $5.00
No. 3. Small box containing cancelled checks ..... No Value
No. 4. One box containing portrait proofs ..... No Value
No. 5. One box containing fishnets ..... Value $2.00

No. 6. One box containing burlap.....Value $2.50
No. 7. Twenty-nine large negatives of
Roosevelt family .....Unknown Value
One small Roosevelt negative
Five negatives of women
One red pocket book, about 150
years old .....Unknown Value

Being instructed by the Court so to do.

W. D. ALLEN, Foreman."

Upon the verdict being signed by the foreman, and returned to the Court, plaintiff in error objected to the acceptance or filing of the verdict, which was denied by the Court, and she preserved her exception.

Plaintiff in error petitioned the court for a new trial based upon irregularity in, and abuse of discretion by the Court in making the order adding Pegram and Borglum as plaintiffs; irregularity in, and abuse of discretion by the Court in granting the motion for, and instructing the jury to bring in the verdict; insufficiency of the evidence to justify the verdict rendered under the instruction of the Court; that the verdict rendered is against law and error in law occuring at the trial and excepted to at the time.

The petition for a new trial was heard on the 20th day of December, 1920, was denied by the Court, to which ruling plaintiff in error preserved her exception, and thereupon the Court signed and entered judgment as follows:

United States District Court, for the Western District of Washington, Northern Division.

No. 5225.

THE NORTH AMERICAN INDIAN, INC., a Corporation,

Plaintiff.

E. S. PEGRAM and GUTSON BORGLUM,

Additional Plaintiffs.

vs

EDWARD S. CURTIS and CLARA J. CURTIS, Formerly Husband and Wife, and CURTIS STUDIO,

Defendants.

JUDGMENT ON THE VERDICT.

The above-entitled matter having come on regularly for hearing before the Honorable E. E. Cushman, Judge of the above-entitled court, on the 5th day of November, 1920, in the Federal Court Building at Seattle, Washington, in the above-entitled District, before a jury of twelve, good and *qualified chosen* from the District, the plaintiffs appearing with their witnesses and attorneys, Elias A. Wright of the firm of Wright & Wright, and A. J. Falknor of the firm of Poe & Falknor; and the defendant, Edward S. Curtis, appearing in person and by his counsel, W. B. Herr, of the firm of Herr, Bayley & Crosen; and the defendant, Clara J. Curtis, appearing in person with her witnesses and attorney, John G. Barnes; and evidence having been

introduced by the plaintiffs to substantiate their cause of action and the defendant, Clara J. Curtis, in support of her defense thereto—the defendant, Edward S. Curtis, offering no testimony; and at the close of all of the testimony, the plaintiff, The North American Indian, Inc., a corporation, moved the Court for an instructed verdict for all of the property seized by the Marshal, as shown by the writ of replevin herein and the Marshal's return thereon and now located and situated in Room 64 Cobb Building in Seattle, King County, State of Washington, in the District of the United States District Court above entitled; thereafter the Court, on the application of E. S. Pegram and Gutson Borglum, as directors and trustees of the plaintiff corporation, they were added as additional plaintiffs under order of the Court herein jointly with the original plaintiff, and thereafter the Court duly considered—after argument of counsel—the motion of the plaintiffs for an instructed verdict herein, and granted the same, and directed the jury to return a verdict for the plaintiffs for all of the property replevined by the plaintiff and seized by the marshal and now located in Room 64 Cobb Building, Seattle, King County, Washington, in the above-entitled Federal District, save and except certain property as shown by the verdict, the motion of the defendant Clara J. Curtis having been denied and her exception allowed,

NOW, THEREFORE, in pursuance of said motion and directed verdict heretofore duly returned

and filed in this court by direction of this Court, it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiffs are the owners of and entitled to the possession of all of the property replevined by the plaintiff and seized by the marshal and now located in Room 64, Cobb Building, in Seattle, King County, Washington, in the above-entitled Federal District, save and except the following:

No. 1. Mimeograph .....No Value
No. 2. Three printing-frames.....Value $5.00
No. 3. Small box containing cancelled checks .....No Value
No. 4. One box containing portrait proofs .....No Value
No. 5. One box containing fishnets.....Value $2.00
No. 6. One box containing burlap.....Value $2.50
No. 7. Twenty-nine large negatives of Roosevelt family .....Unknown Value
One small Roosevelt negative
Five negatives of women
One red pocketbook, about 150 years old .....Unknown Value

which said excepted property the plaintiffs are hereby ORDERED to return to the Curtis Studio, the place from whence it was seized, or, in the event of their failure so to do, that they pay to the defendants the sum of nine and 50|100 ($9.50) Dollars, the value of said property, and it is further

ORDERED, ADJUDGED and DECREED, the plaintiffs having waived their costs as against the defendants as a condition for the adding of the ad-

ditional plaintiffs, E. S. Pegram and Gutson Borglum, that none of the parties recover costs as against the other herein.

Done in open court this 20th day of December, 1920.

EDWARD E. CUSHMAN,
Judge.

Plaintiff in error gave the defendant Edward S. Curtis notice of her intention to apply for a writ of error, and requested him to join therein, and upon his written refusal so to do, sued out a writ of error. She brings the cause before this Court for a review of the errors of law which she claims were committed by the lower court in denying her motion to quash the writ of replevin, and its execution, in the trial of the action, in the verdict, and in the judgment.

SPECIFICATION OF ERRORS.

I.

That the Court erred in making and entering its order on the 17th day of May, 1920, denying the motion of plaintiff in error to quash and annul the writ of replevin issued in this cause on the 19th day of April, 1920, and to quash and annul the execution of said writ by the Marshal, for the reasons that the Court was without jurisdiction, right or authority to issue said writ of replevin, and the Marshal was without right or authority in executing the same,

such a writ being unknown, and unprovided for, under the laws of the State of Washington.

II.

The Court erred in denying the objection of the plaintiff in error to the admission in evidence of plaintiff's Exhibit 15, and in admitting said exhibit in evidence. The full substance of plaintiff's Exhibit 15 is that it consists of (1) A purported notice of assessment and receipt from the state tax department, Albany, New York, dated the 18th day of November, 1919, notifying North American Indian, Inc. 437 5th Ave., New York City, that there had been assessed against it an estate franchise tax for period ending October 31, 1920, one mill on cap. stk., amounting to the sum of $110.00, due and payable on or before January first, 1920, stamped: "Jan. 9-20 Received payment. Eugene M. Travis Comptroller," and (2) A certificate of the Secretary of State of the State of New York, under the office seal, certifying that the certificate of incorporation of the North American Indian, with acknowledgment thereto annexed, was filed and recorded in his office on the 18th day of December, 1909.

III.

The Court erred in granting the petition of E. S. Pegram and Gutson Borglum that they be added as plaintiffs in the action; and in making and entering its order adding said E. S. Pegram and Gutson Borglum as plaintiffs in action, for the reasons:

1. Said petition was filed, and said order made, after both the plaintiff in the action, and plaintiff in error, had each closed its, and her, case to the jury, and after the plaintiff in the case had moved the court to "direct the jury to return a verdict for the plaintiff in accordance with the demand of the complaint, excepting from the verdict the property that Mr. Curtis has indicated as exceptions that don't belong to the plaintiff."

IV.

That the Court erred in granting the motion of plaintiff, and additional plaintiffs, "to direct the jury to return a verdict as requested," and in directing the jury to return the verdict which the Court instructed it to return, and which, in accordance with such instruction, it did return in the case, for the reasons:

1. No amendment of the complaint in the action was sought, granted or made, after the entry of the order adding the additional plaintiffs.

2. No reopening of the case was sought, granted or had by the plaintiff, or additional plaintiffs, or either of them, and said verdict was instructed to be returned solely upon the evidence introduced by plaintiff, and plaintiff in error, and after each of them had closed their case to the jury.

V.

That the Court erred in instructing the jury to render, and in receiving and accepting the verdict

returned by the jury in accordance with such instruction and direction; and the verdict so directed, returned and received, is against law and the evidence in the case is insufficient to justify said verdict, for the following reasons:

1. No evidence whatsoever was offered, or introduced in the case as to the citizenship of either of the additional plaintiffs E. S. Pegram, or Gutson Borglum.

2. No evidence whatsoever was offered or introduced in the case that either of said additional plaintiffs had any right, title, or interest of any kind whatsoever, or right to possession, of any property whatsoever, or at all, either that mentioned in the complaint, or in that "replevined by the marshal, now located in room 64 Cobb Building, Seattle, Washington," as in the verdict.

3. Said verdict does not find the jurisdiction fact put in issue by the complaint and answer of the plaintiff in error thereto, that at the time of the commencement of the action the plaintiff in the case was a corporation existing under and by virtue of the laws of the State of New York, or that it had any existence whatsoever, or at all, whereas, the evidence introduced by the plaintiff in error was conclusive, undisputed and admitted, that by reason of the expiration of the time limit fixed in its certificate of incorporation for the duration of its existence, the plaintiff corporation in the case had ceased to exist on the 18th day of December, 1919—four months before the action was commenced.

4. That said verdict is wholly insufficient to support any judgment whatsoever, and is fatally defective, in that it does not refer to, nor describe, the property, or any of it, mentioned, referred to, or set out in the complaint in the action.

5. That said verdict is wholly insufficient, and is fatally defective in that it does not determine either the ownership of, or right to possession of, all, or any part, of the property referred to, or set out in the complaint, and as to which issue was joined by the answer thereto of plaintiff in error.

6. That said verdict is fatally defective, and wholly insufficient to support any judgment whatsoever in that it does not determine the gist of the action issue made by the complaint and each of the answers of plaintiff in error and defendant Edward S. Curtis, of the alleged wrongful and unlawful detention by plaintiff in error, or defendant Edward S. Curtis, or either of them, of the property referred to, or set out, in the complaint, or of any property whatsoever, or at all.

7. That said verdict is fatally defective, and wholly insufficient to support any judgment in that it does not determine the issue raised by the complaint and the answer thereto of plaintiff in error, of the possession by plaintiff in error at any time, or at all, of any of the property referred to, or set out, in the complaint.

8. That said verdict is wholly insufficient and fatally defective in that it does not find the value

of the property referred to, or set out, in the complaint, or of the property referred to in said verdict, or of any other property save only certain other property which said verdict finds the plaintiffs are not the owners, nor entitled to the possession, and which property is not referred to, described nor set out in the complaint.

VI.

The Court erred in taking from the jury the right to pass upon the following jurisdictional issues of fact, raised by the complaint and the answer thereto of plaintiff in error, and by the answer of defendant Edward S. Curtis:

1. The issue of fact as to whether or not the plaintiff, The North American Indian, Inc., was at the time of the commencement of the action a corporation organized and existing under and by virtue of the laws of the State of New York. Plaintiff in error introduced in evidence Defendant's Exhibit A which is an exemplified certified copy of the certificate of incorporation of The North American Indian, certified to be such by the Secretary of State of the State of New York, under the office, and great seal of the State of New York, which shows that the certificate of incorporation of said corporation was filed in the office of the Secretary of State of the State of New York on the 18th day of December, 1919; that it is provided in such certificate of incorporation that the duration of the existence of said corporation shall be ten years.

Plaintiff in error also introduced in evidence two sections of the laws of the State of New York, one providing the manner in which the term of the existence of a corporation could be extended beyond the time specified in its original certificate of incorporation, and the other providing that upon the dissolution of a corporation its directors at the time of such dissolution shall be the trustees of its creditors and stockholders, with full power to settle its affairs, with authority, by their name as such trustees, to sue for and recover the debts and property of the dissolved corporation. No evidence whatsoever was offered by plaintiff in the case in rebuttal of the evidence so introduced by plaintiff in error.

2. The value of the property referred to, or set out, in the complaint. Upon this issue there was no evidence whatsoever.

VII.

The Court erred in denying the motion of the plaintiff in error for a new trial upon the grounds:

1. Insufficiency of the evidence to justify the verdict rendered under the instructions of the court.

2. That the verdict is against law.

3. Error in law occurring at the trial and excepted to at the time by plaintiff in error.

VIII.

The Court erred in making and entering the judgment made and entered in the case:

1. Because there is no verdict sufficient in law to support said judgment, or any judgment.

2. Because said judgment does not conform to the verdict in the case in that it is therein adjudged "that the plaintiffs are the owners of and entitled to the possession of all of the property replevined by the plaintiff," whereas the verdict is "that the plaintiffs are the owners of, and entitled to the possession of all the property replevined by the marshal."

3. Because the verdict did not find, and the court was without jurisdiction to adjudge that plaintiffs return to the Curtis Studio the property described in the judgment as not belonging to plaintiffs, or that in the event of their failure so to do, they pay the defendants the sum of Nine and 50/100 Dollars, the value of said property.

ARGUMENT AND AUTHORITIES

I.

Error in Denying Motions of Plaintiff in Error to Quash Writ of Replevin and its Execution by the Marshal.

It may be asserted with confidence that the writ of replevin (Record p. 20) issued in this case is the only one of its kind ever issued in either the Territory, or State of Washington. The first session of the Territorial legislature was held in 1854, and it

enacted the "claim and delivery" statute applicable to justice of the peace courts, and the legislature of the Territory in 1869 passed the act providing for like proceedings in the District Courts of that time, of which the present Superior Courts of the State of Washington are the successors. Neither of these statutes have been changed in the slightest degree, and they stand, and have always stood, as originally enacted. The statute applicable to the case at bar is contained in sections 707-717 of Remington's Code of Washington, those pertinent herein being as follows:

> 707. The plaintiff in an action to recover the posession of personal property may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property as herein provided.
>
> 708. When a delivery is claimed an affidavit shall be made by the plaintiff, or by some one in his behalf, showing:
>
> 1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth;
>
> 2. That the property is wrongfully detained by the defendant;
>
> 3. That the same has not been taken for a tax, assessment, or fine pursuant to a statute, or seized under an execution or attachment against the property of the

plaintiff, or if so seized, that it is by law exempt from such seizure; and

4. The actual value of the property.

709. Upon the receipt of the affidavit, and a bond to the defendant, executed by one or more sufficient sureties, approved by the sherriff, to the effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit and bond by delivering the same to him personally, if he can be found, or his agent, from whose possession the property is taken; or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or if neither have any known place of abode, by putting them in the postoffice, directed to the defendant, at the postoffice nearest his place of residence.

710. The defendant may, within three days after the service of a copy of the affidavit and bond, give notice to the sheriff that he excepts to the sufficiency of the sureties; if he fail to do so he shall be deemed to have waived all objections to them. When the defendant excepts the sureties shall justify on notice in like manner as bail on arrest, and the sheriff shall be responsible for the sufficiency of the sureties

until the objections to them is either waived as above provided, or until they shall justify, or new sureties shall be substituted and justify. If the defendant except to the sureties he cannot reclaim the property as provided in the next section.

711. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a bond, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section 716.

712. The defendant's sureties, upon a notice to the plaintiff or his attorney of not less than two nor more than six days, shall justify in the same manner as bail upon arrest; upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify, or until justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

713. The qualification of sureties and their justification shall be as prescribed in respect to bail upon an order of arrest.

715. When the sheriff shall have taken the property as herein provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping the same.

717. The sheriff shall file the affidavit, with the proceedings thereon with the clerk of the court in which the action is pending within twenty days after taking the property mentioned therein.

In *Scott vs. McGraw,* 3 Wash. 678, the court says:

"In this state we have no common law action of replevin. That action has been abrogated, and the statutory action commonly called "claim and delivery" under the codes of the various states, has been substituted in its stead."

R. S. section 914, requires that in this action the District Court should conform to the practice, pleadings, forms and mode of proceeding in a like cause in a Superior Court of the State of Washington, any rule of court to the contrary notwithstanding. It is evident, therefore, that the District Court was in error when it made an order directing the issuance of a writ of replevin (Record p. 19), and was again in error in reciting therein that it finds "from the plaintiff's complaint herein on file and the affi-

davit in support thereof that the cause of action for replevin is stated therein."

As in Washington, so in Virginia, the action of replevin had been abrogated. In Baltimore & O. R. Co., vs. Hamilton, 16 Fed. Rep. 181, in an action commenced in Virginia claiming the possession of chattels alleged to be wrongfully withheld, the plaintiff caused a writ of replevin to issue out of the United States Circuit Court, and the property seized thereunder by the Marshal, precisely as was done in the case at bar. The defendant moved to quash the writ of replevin, and in its decision on the motion the Court, after referring to the provisions of R. S. section 914, says:

> "Now, on a like case, that is, in a case where a person is complained of for taking possession of and holding the chattels of another wrongfully, the courts of Virginia are not permitted to give the writ of replevin to a plaintiff to remedy his wrong; and as we must follow their form and mode of proceeding in such a case, we are not at liberty to issue that writ, but must follow the state's form and mode, whatever they may be. * * * The motion to quash is granted."

In the case at bar the plaintiff entirely ignored the "form and mode of proceeding" provided by the statute of Washington for claiming the immediate possession of the property which it alleged plaintiff in error was wrongfully withholding from it. Instead of delivering the affidavit and bond to the

Marshal they were filed with the clerk of the court, at the same time as the complaint, and neither of them were ever in the hands of the Marshal. Instead of the bond being delivered to the Marshal, and approved by him, it was presented to the Judge, and by him approved. (Record p. 19) This he was wholly without authority to do, and because the writ of replevin was wholly unauthorized, and therefore void upon its face, the bond given to procure it was likewise void, and no liability attached thereto notwithstanding all of the parties might have treated all the proceedings as regular.

Hicks vs. Mendenhall, 17 Minn. 475.

Rosen vs. Fischell, 44 Conn. 371.

In construing a statute the counterpart of section 709, excepting that in California the plaintiff is required to indorse an order for taking the property upon the affidavit before delivering it to the sheriff, in *Laughlin* vs *Thompson,* 76 Cal. 287, 290, 18 Pac. 330, the Court says:

> "In case of "claim and delivery" the affidavit, order indorsed thereon, and undertaking all go into the hands of the officer, and constitute the process. He must determine whether they are regular and sufficient."

In sections 678 and 679 of his work on the law of replevin Mr. Cobbey says:

> "Where the statute makes the sheriff the judge of the bond, the court will not interfere with the exercise of his discretion. The officer is the exclusive judge of the sufficiency of the

> bond in the first instance. He can require just such a bond as the statutes provide for, and none other, but he is the sole judge of the bond, and is responsible on his official bond if he fail in his duty to either party. He is also responsible for the bond being in the statutory form, and for its being executed in the statutory manner."

One illustration among many which might be given, will suffice to show why this must be so. Under section 710 plaintiff in error had three days after the service upon her of a copy of the affidavit and bond, within which she might give a notice to the marhsal that she excepted to the sufficiency of the sureties upon the bond. During that three day period the marshal was "responsible for the sufficiency" of the sureties, and, had the notice of exception been given, the responsibility of the Marshal would have continued until justification or the substitution and justification, of new sureties. The Court, on the other hand, was under no responsibility at any time, or at all. By its act it had deprived her of her statutory right, and had caused her property to be taken without due process of law.

II.

Error in Admitting Plaintiff's Exhibit 15 in Evidence.

Plaintiff in error having specifically denied the allegation of the complaint that the plaintiff therein was a corporation organized and existing under

and by virtue of the laws of the State of New York, the burden was upon it of proving both its corporate organization, and existence as alleged. The state where organized, because that determined its citizenship, and its existence, because upon that depended its capacity to wage the action.

Roberts vs. Lewis, 144 U. S. 653, 36 L. Ed. 579.

W. L. Wells Co. vs. *Gastonia Cotton Mfg. Co.,* 198 U. S. 177, 49 L. Ed. 1003.

Lindsay-Britton Live Stock Co. vs. *Justice,* 191 Fed. 163.

Failure to prove that allegation ended the authority of the court to proceed with the trial.

The proper method of proving the organization and existence of the plaintiff corporation was to introduce the act of the state of New York by or under which it was created, or organized, and then to introduce the certificate of incorporation, or a copy thereof, authenticated in the mode prescribed by R. S. section 906.

Owen vs. Shepard, 59 Fed. 746.

As to its organization it offered no proof whatsoever. The only evidence it offered as to its existence was plaintiff's Exhibit 15, (Record p. 119) which was admitted over the objection and exception of plaintiff in error. (Record pp. 67, 68)

The exhibit consists of two separate and distinct papers, held together by a wire clip. One of the pa-

pers is dated Nov. 18, 1919, and purports to be a notice by the state tax department, Albany N. Y., of a tax of one mill on capital stock of North American Indian Inc., for period ending October 31, 1920, due and payable on or before January 1, 1920, and rubber stamped receipt of payment on Jan. 9, 1920, by Comptroller. The other paper is a certificate of the Secretary of State of the state of New York, under his office seal, that the certificate of incorporation of the North American Indian, with acknowledgment thereto annexed, was filed and recorded in his office on the 18th day of December, 1909.

As to the assessment notice and receipt I submit that it is quite sufficient to say that when the notice was sent the corporation was still alive, its existence not having ended by reason of the expiration of the duration thereof fixed in its certificate of incorporation, until the 16th day of December, 1919, and that payment, or receipt, of the tax subsequent to the dissolution, would in no wise prove, or tend to prove, an extension of the life of the dead corporation. And this even though the paper had been authenticated, or identified in any way, which it was not.

Mc Donald vs. *New World Ins. Co.,* 76 Wash. 488-490.

Koloff vs. C. M. & St. P. R. R. Co., 71 Wash. 543, 553.

The witness Albert, who testified that he was the office manager of the plaintiff corporation, and who,

as such presumably paid the tax, was not asked either to identify the paper, swear to its genuineness, or to the fact of payment of the tax.

The certificate of the Secretary of State was clearly inadmissable in evidence. There is no provision anywhere, either in the laws of the United States, or of the State of Washington, which sanctions its admission. R. S. section 906 which provides that an exemplified certified copy of the certificate of incorporation of the plaintiff corporation, under the great seal of state of the State of New York, would be admitted in evidence, and "should have such faith and credit given to it" by the trial court as it had by law, or usage, given it in the courts of the state of New York, governs, and should have been followed.

Whitford vs. Clark Co., 119 U. S. 522, 30 L. Ed. 500.

But no such copy of the certificate of incorporation of the North American Indian was ever offered in evidence. The reason why is patent upon the record. Even the certificate of filing which was offered and received, was inadmissable for want of proper authentication, if for no other reason.

Milwaukee Gold etc. Co., vs. Gordon, 37 Mont . 209, 95 Pac. 995.

III.

Error in Adding Pegram and Borglum as Plaintiffs.

The purpose of adding Pegram and Borglum as plaintiffs in the action is stated in their petition to be that "of protecting the property and rights of the plaintiff herein." (Record p. 31) Their petition was filed after both parties litigant had rested the case, four days after the attorney for plaintiff in error—upon whom the Court had thrust the laboring oar—had submitted his argument against the granting of the motion of the plaintiff for an instructed verdict. (Record p. 75)

The essence of that argument was: That the plaintiff in error having introduced indisputable proof of the fact that more than four months before the action was commenced in its name, the plaintiff corporation had ceased to exist by reason of the expiration of the time fixed in its certificate of incorporation for the duration of its life, it was the duty of the Court to abate the action in accordance with the provisions of section 37 of the Judicial Code, for the reasons:

1. The time limited in the certificate of incorporation of the plaintiff corporation having expired on the 16th day of December, 1919, *ipso facto* its extinction was complete without any judicial determination of that fact, and it was both *de jure* and *de facto* dead.

Pendleton vs. Russell, 144 U. S. 640, 36 L. Ed. 574.

Crossman vs. Vivienda Water Co., 150 Cal

Sturges vs. Vanderbilt, 73 N. Y. 384, 390.

Marion Phosphate Co. vs. Perry, 74 Fed. 575, 89 Pac. 335.

425.

That even if it continued to exercise without authority its corporate powers after such dissolution it did not thereby become a *de facto* corporation in so far as it might assert rights and powers as a corporation:

Clark vs. Am. Cannel Coal Co., 165 Ind. 213, 73 N. E. 1085.

Bradley vs. Reppell, 133 Mo. 545, 32 S. W. 645, 34 S. W. 841.

2. That under section 35 of the general corporation law of New York, (Record, pp. 70, 71), the domicile of the former corporation, as well as under section 3707 of Remington's Code of Washington, the law of the forum, upon the extinction of the corporation the title to all its property vested in the then directors as trustees for the creditors and stockholders of the defunct corporation

Bank vs. Walker, 66 N. Y. 424.

People vs. O'Brien, 111 N. Y. 1, 18 N. E. 692.

Aalwyns Law Institute vs. Martin, 173 Cal. 21, 159 Pac. 158.

That those trustees, and they only, in their name as such, could commence, or maintain, an action to recover the possession of the property of the dead corporation.

Crossman vs. Vivienda Water Co., 150 Cal. 575, 89 Pac. 335.

Paola Town Co. vs. Krutz, 22 Kan. 725.

Root vs. Wear, 98 Kan. 234, 157 Pac. 1181.

Consolidated Asso. of Planters vs. Mason, 24 La. Ann. 518.

McCoy vs. Farmer, 65 Mo. 244.

Sturges vs. Vanderbilt, 73 N. Y. 384.

Marstaller vs. Mills, 143 N. Y. 398, 38 N. E. 370.

Creus vs. Farmer's Bank, 31 Gratt. (72 Va.) 348.

3. That any judgment which the court might render, either in favor of, or against the plaintiff corporation, would be an absolute nullity.

Mumma vs. Patomac Co., 8 Pet. 281, 287, 8 L. Ed. 945.

Hardman vs. Sage, 124 N. Y. 25, 34, 26 N. E. 354.

May vs. State Bank, 2 Rob. (Va.) 56.

Hawley vs. Queen Mining Co., 61 Wash. 90.

Droppleman vs. Illinois Surety Co., 95 Wash. 476.

Peck vs. Linney, 97 Wash. 103, 114.

Upon the conclusion of the argument upon plain-

tiff's motion for an instructed verdict, the Court, without deciding it, continued the trial for four days. (Record p. 75) Upon the resumption of the trial plaintiff's attorneys filed the petition of Pegram and Borglum. In presenting it to the Court they said: (Record p. 75)

> "If the Court please we are submitting at this time a petition to add as plaintiffs the existing trustees, Mr. Pegram and Mr. Borglum, one in the state of New York, and the other in the state of Connecticut. We have asked to add, not substitute, because I don't think substitution is necessary. We are asking that these two trustees be associated in this case at this time."

Thereupon, over the objection and exception of plaintiff in error, (Record pp. 76-78) the Court made and entered the order adding the two persons named "as plaintiffs in the above action."

The persons who by their will, created the corporation North American Indian, in the very act of its creation numbered the years of its existence. With the passing of those years its life ceased. Months after its death an attorney claiming to represent the extinct corporation, appeared before the manager of the Curtis Studio and said: "I come up here and want this property. It belongs to the North American Indian." There is no evidence as to what the manager said, but two or three weeks later the attorney filed in the District Court a complaint, verified by him, in which the dead corporation is plaintiff, in

which it is alleged that defendants were unlawfully detaining the property of plaintiff, and demanding its possession. The same attorney swore to an affidavit averring positively that the property was the property of the plaintiff corporation, and that defendants were unlawfully withholding it from the corporation. In the name of the corporation he executed a bond, caused a writ of replevin to issue, and the Marshal to seize, not only the property described in the complaint, but a large amount of property in addition to such described property. On the trial the only purport of the evidence submitted on the part of plaintiff was to show that the plaintiff was an existing corporation, owner of, and entitled to the possession of the property taken by the Marshal—not that described in the complaint. There was absolutely no evidence that Pegram and Borglum had any interest in, or were in any manner connected with the property, the demand, or the institution of the action. Confronted in court with proof of the indisputable fact that they had no client; that everything that had been done in the name of the dead corporation—demand, complaint, affidavit, bond, seizure—was an absolute nullity, the attorneys beseeched the Court to *nunc pro tunc* re-create and vitalize the dissolved nothing which had borne the corporate name, by its fiat of "associating" with the name of the dead corporation the names of two live strangers, and that by that act the Court would validate all that which had been void.

Incomprehensible as it is, the Court did that thing. It is self-evident that if the corporation was still in existence then its sole directors Pegram and Borglum, if such they were, could not join with it in the action, for they neither personally, nor as directors, had suffered any injury. If the corporation was dead then the title to its property passed to its former directors who became trustees, not for the corporation, for that was dead, but for its creditors and stockholders, and in their name, as such trustees, they must make the demand, and must be plaintiff in the action.

Miami Exporting Co. vs. Gano, 13 Ohio 270.

After Pegram and Borglum had been added as plaintiffs no leave to amend the complaint was asked, no further evidence was introduced. In *Oldfield vs. Angeles Brewing and Malting Co.,* 72 Wash. 168, the Court says:

> "No leave to amend was requested. No rule of construction, however liveral, can permit the trial of an issue not tendered in the complaint, over the objection of the defendant. To permit such a course would be to ignore the statute, dispense with formal pleadings, and invite endless confusion."

If such is the rule where there was evidence, what is to be said when there was no evidence whatsoever as to Pegram and Borglum.

That Pegram and Borglum could not have been substituted as plaintiffs is too well settled for argument. There is no such thing as a vicarious right of

action to recover property wrongfully detained, where its immediate delivery has been claimed.

Liebman vs. McGraw, 3 Wash. 520.

Bardwell vs. Stubbert, 17 Neb. 485, 23 N. W. 344.

Flanders vs. Lyon, 51 Neb. 102, 70 N. W. 524.

Meyer vs. Omaha Furniture Co., 76 Neb. 405, 107 N. W. 767.

Anderson vs. Stewart, 108 Md. 340, 70 Atl. 228, 232.

McRae vs. Kansas City Piano Co., 69 Kan. 457, 77 Pac. 94.

Wilde vs. Paschen, 67 Wis. 90, 30 N. W. 279.

IV.

Error in Granting the Motion for a Directed Verdict.

Immediately upon the signing of the order adding Pegram and Borglum as plaintiffs, (Record p. 77) counsel for plaintiffs moved the Court to direct a verdict "as requested," whereupon the Court granted the motion and instructed the jury to return the verdict it did, to all of which plaintiff in error, in accordance with rule 60 of the District Court, preserved an exception. (Record p. 80).

Under the repeated decisions of the Supreme Court of Washington, which are binding upon the District Court, the power of the trial court to direct a verdict is to be exercised only when the court can

say, as a matter of law, that there is neither evidence, nor reasonable inference from evidence, sufficient to sustain any other verdict, or judgment. Such a motion invokes no element of discretion, but calls for the exercise of a pure judicial function."

Brown vs. Walla Walla, 76 Wash. 670.
Forsyth vs. Dow, 81 Wash. 137.
Paich vs. Northern Pacific, etc., 82 Wash. 581.
Fobes Supply Co. vs. Kendrick, 88 Wash. 284.
Washington Trust Co. vs. Keyes, 88 Wash. 287.

Applying the rule to the case at bar, it is obvious that the Court erred in granting the motion. As to the additional plaintiffs there were no pleadings, and no evidence, therefore, under no circumstances could the Court be warranted in granting the motion as to them. As to the plaintiff corporation, not only had it failed to prove the truth of a single one of the material allegations of its complaint, but there was proof conclusive that its jurisdictional allegation of existence was not true. Not only had it failed to offer any proof of the gist-of-the-action allegation of wrongful detention by plaintiff in error, but, on the contrary, had itself offered the evidence showing that she was not in possession. (Testimony of witness Patten, Record p. 63, and Record pp. 114-15, Plaintiff's Exhibit 13, letter dated April 9, 1920, wherein it is stated that in the divorce decree Mrs. Curtis had been awarded the Curtis Studio, that Mr. Curtis had appealed to the Supreme Court from that part of the decree awarding her the Stu-

dio, that the Supreme Court had just affirmed the award, and that "Mrs. Curtis expects to be able to take possession of the Curtis Studio in about thirty days.")

V.

Error in Instructing the Jury to Return the Verdict, and in the Verdict.

Section 362 of Remington's Code of Washington provides:

> "The verdict of a jury is either general or special. A general verdict is that by which the jury pronounces generally upon all or any of the issues either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only, leaving the judgment to the court."

There can be no dispute but that under this law the verdict in this case (Record p. 34) is a special verdict. Its findings are limited to two facts only, viz: ownership and right of possession.

Hickey vs. Breen, 40 Mont. 368, 106 Pac. 881.

In Vol. 23 R. C. L. p. 936, section 108, it is said:

> "In action of replevin, or claim and delivery, the usual rule applies that the verdict is bad if it varies from the issues in a substantial matter, or if it finds only a part of that which is in issue. Whether the jury find a general, or a special verdict it is their duty to decide the very point in issue; and although the court in which the cause is tried may give form to a

> general finding so as to make it harmonize with the issue, yet if it appears to that court, or to the appellate court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered on the verdict. A general verdict for the plaintiff in replevin is a finding in his favor on all the issues of fact made by the pleadings, and therefore includes a finding of an unlawful taking, or detention, but a special verdict in favor of the plaintiff is defective where the issues include an unlawful taking, or detention, and the verdict is silent as to whether there was an unlawful taking or detention."

Moreover, the rule is well established that the failure of a jury to find affirmatively and specifically on a matter alleged in a pleading, and in issue, in a special verdict, is equivalent to a finding against such allegation, being the same as a finding against the party who has the burden of proof on that issue.

> *Dennis vs. Louisville, etc., R. Co.,* 116 Ind. 42, 18 N. E. 179.
>
> *Bates vs. Chicago, etc., R. Co.,* 140 Wis. 235, 122 N. W. 745.

The verdict herein is silent upon every issue of facts made by the pleadings, and speaks only of facts upon which there was no issue. There was no issue raised by the pleadings upon the question of ownership by, or right to possession of, "the plaintiffs." There was no issue in the pleadings upon either the ownership or right to possession, of anybody, of "all the property replevined by the mar-

shal, now located in Room 64 Cobb Bldg., Seattle, Washington, except the following," etc. It is not surprising that the verdict should be silent upon every issue made by the pleadings, for either there was no proof at all, or the proof introduced refuted every material allegation of the complaint put in issue by the answer of the plaintiff in error. To illustrate: From the beginning to the end of the trial the property described in the complaint was not mentioned in the evidence. The evidence was all confined to the property which the marshal took, and which was at the time of the trial in room 64 of the Cobb Building.

Outside of jurisdiction, the vital issue in the case was that of the alleged, and denied, unlawful detention by plaintiff in error of the property described in the complaint. In *Dow vs. Dempsey,* 21 Wash. 86, 95, the Court says:

> "The primary object of the action of claim and delivery under the code, is to recover the possession of personal property in specie, and the gist of the action is the wrongful detention of the property by the defendant. In such an action it is necessary for the complainant in order to state a cause of action, to allege that the property, recovery of which is sought, is wrongfully detained by the defendant. And the failure to prove the allegation must of necessity be a fatal variance."
>
> *Fries vs. Lockwood,* 64 Wash. 221, 223.

As has been heretofore shown, not only was there entire lack of proof of possession by plaintiff in

error, but the attorneys for the alleged plaintiff furnished the evidence that she was not in possession. Indeed, the sign boards along the way traveled by this action are painted in letters so large that even the speeding joy-rider might read, that the sole object of the action was to prevent plaintiff in error from coming into possession of the property—the very thing which the complaint alleges she had. To mention but two of these, let me refer to the significant fact that although the statute (Sec. 709) authorized the taking of property by the officer only "if it be in the possession of the defendant, or his agent," and the writ of replevin directed the marshal to take only "from the defendants," both the first, and supplemental, return of the marshal are silent as to from whom he took. The evidence is (Record pp. 63, 64) that a person other than either of the defendants was in possession of the property which the marshal took. Mr. Pomeroy in his work on Code Remedies, section 297, says:

> "The common-law rules as to parties defendant in an action to recover possession of chattels have not been in any manner affected by the new procedure. Such actions must be brought against the party or parties in actual possession of the chattel demanded by the plaintiff. If this actual possession is in one, he must be the sole defendant, if in two or more jointly,—as, for example, in a partnership,—they must all be made defendants."

Seattle Natl. Bank vs. Meerwaldt, 8 Wash. 630.

Even if the verdict in this case had been a general one in favor of the plaintiffs it would still be so fatally defective and insufficient that it would not support a judgment.

1. The law is that the verdict must describe the property with such definiteness and certainty that it may be clearly identified.

Lehman vs. Myer, 74 N. Y. S. 194.
Guille vs. Fook, 13 Ore. 577, 11 Pac. 277.
Bossard vs. Vaughn, 68 S. C. 96, 49 S. E. 523.
Eason vs. Miller, 18 S. C. 381.
Harris vs. Anstill, 2 Baxt. (Tenn.) 148.
Stevens vs. Osman, 1 Mich. 92.

And, of course, the description must agree with that in the complaint.

Wolfe vs. Blue, 5 Blackf. (Ind.) 153.

If the property is specifically described in the complaint, the description in the verdict may be made certain by reference to the complaint, but if the description in the complaint is insufficient, a verdict which refers only to the property described therein is fatally defective.

Pierce vs. Langdon, 3 Idaho 141, 28 Pac. 401.
Richardson vs. McCormick, 47 Iowa 80.
Guille vs. Fook, 13 Ore. 577, 11 Pac. 277.

The verdict herein (Record p. 34) makes no reference to the property described in the complaint. It reads: "all of the property replevined by the marshal." Webster's International Dictionary de-

fines one of the meanings of the word "replevied" to be: "C. To seize under a writ of replevin—said of a sheriff or bailiff."

The marshal's return on the writ of replevin (Record p. 22) shows that he took under the writ a large amount of property not mentioned, or described, in the complaint, to-wit:

> "Assortment of Negative and Positive Plates 6 1-2 x 8 1-2 Size Indian Subjects, numbering from 1 to 38,000, as listed in Four Record Books of Corresponding Numbers; 729 Negative and Positive Plates 14x17; 51 Negative and Positive Plates 18x22; 19 Negative and Positive Plates 16x20; 16 Large Bound Portfolios; 19 Volumes of "North American Indian" 3-4 Morocco; 6 Volumes of "North American Indian" in Cloth; 1 Package of Folio Prints; 1 Small Package of Prints; Assorted Portfolio Prints Unbound and 1 Volume of Indian Days of Long Ago—In Cloth."

The marshal's return also shows that he did not take under the writ four items of property set out in the complaint, to-wit:

Indian Saddle, Phonograph, Tripod and Large Assortment of Indian Blankets.

In *Patterson vs. U. S.,* 2 Wheat. 221, 4 L. Ed. 224, it is said that a special verdict in order to support a valid judgment must be responsive to the issues raised. It should be the end, and not the basis for the continuance of the same controversy. If it varies from the issues in a substantial manner, or

finds only part of that which was in issue, it is a nullity, and does not in itself affect the rights of either party. The court can draw no conclusions of law therefrom, nor render a judgment thereon.

In harmony with the rules thus laid down it has been held that in a case of this kind a verdict finding the plaintiff entitled to a part of the property in issue, and silent as to the rest, is fatally defective, although the omitted property has not been taken from the possession of defendant, and his answer does not ask for return.

Carrier vs. Carrier, 71 Wis. 111, 36 N. W. 626.

Feder vs. Daniels, 79 Wis. 578, 48 N. W. 799.

And this is so even if the right to possession of but one article is undetermined by the verdict.

Young vs. Lego, 38 Wis. 206.

Maxon vs. Penott, 17 Mich. 332.

The verdict restricts the ownership and right to possession of the property taken by the marshal to that "now located in Room 64 Cobb Building, Seattle, Washington," i. e., to that property on the 9th day of November, 1920, in said room, and, as if there was not already enough "confusion worse confounded" it excepts from the property taken by the marshal, then in room 64 of the Cobb Building, ten certain items of property. Now, these ten excepted items are not mentioned, or described, in either the complaint or the marshal's return. Edward S. Curtis testified (Record p. 69) that eight of the ten

excepted items did not belong to the North American Indian, but as to the other two items, to-wit: "No. 2. Three printing-frames, value $5.00; One red pocketbook, about 150 years old, Unknown value," there is no reference to them in the case.

2. The verdict is fatally defective in that it does not find the value of the property referred to therein.

Section 363 of Remington's Code of Washington provides:

> "In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, * * * the jury shall assess the value of the property if their verdict be in favor of the plaintiff."

Of a surety the property which the marshal took in this case had not been delivered to the plaintiff, because the plaintiff did not exist. The marshal's returns state (Record pp. 21 and 23) that he stored the property in "No. 64 Cobb Bldg., in charge of George W. Slade." That it was still in the possession of the marshal, at said place, at the time of the trial is indicated by the questions of counsel for plaintiff as shown on pages 47 to 60 of the record.

The verdict was not in compliance with the mandatory provisions of the statute, and therefore illegal.

Meeker vs. Johnson, 3 Wash. 247, 254.

Quinn vs. Parke & Lacy M. Co., 5 Wash. 276.

VI.

Error in Taking From Jury Right to Pass Upon the Jurisdictional Issues of Fact.

Considered independently of the other questions in the case, I submit that the Court erred in taking from the jury the right to pass upon the jurisdictional issue of the diversity of citizenship and existence of the plaintiff corporation. As has been hereinbefore stated, my contention was, and is, that the Court should have abated the action under section 37 of the Judicial Code. Having declined to do that, I think it is clear that it should have submitted the issue to the jury, under a proper instruction.

Gilbert vs. David, 235 U. S. 568, 59 L. Ed. 363.

Roberts vs. Lewis, 144 U. S. 653, 36 L. Ed. 579.

Lindsay-Britton Livestock Co. vs. Justice, 191 Fed. 163.

VII.

Error in Denying the Motion for a New Trial.

Plaintiff in error filed and presented to the Court her motion for a new trial, based upon the same grounds as those of her assignment of errors herein. (Record p. 82). The Court denied the motion (Record p. 88) and error is assigned thereon. Inas-

much as the matters presented to the Court by the motion for a new trial are the same as those presented in this brief, excepting questions relating to the judgment, it is unnecessary to repeat them..

VIII.

Error in the Judgment.

The judgment entered (Record p. 36) is void.

1. The North American Indian, Inc., having been dissolved long before the demand for possession, or commencement of the action, the joint judgment in its favor is an absolute nullity.

Pendleton vs. Russell, 144 U. S. 640, 36 L. Ed. 574.

McCulloch vs. Norwood, 58 N. Y. 562.

Sturges vs. Vanderbilt, 73 N. Y. 384.

Thorton vs. Marginal Freight Co., 123 Mass. 32.

Dobson vs. Simonton, 86 N. C. 492.

Newhall vs. Western Zinc Min. Co., 164 Cal. 380, 128 Pac. 1046.

Ins. Comm. vs. U. S. Fire Ins. Co., 22 R. I. 377.

Ingraham vs. Terry, 11 Humph. (Tenn.) 572.

Hawley vs. Queen Min. Co., 61 Wash. 90.

Droppleman vs. Illinois Surety Co., 95 Wash. 476.

Peck vs. Linney, 97 Wash. 103, 114.

2. The law is that in actions of this kind a joint judgment can only be entered for parties who have

a community of interest in the property in question.

Sweetzer vs. Mead, 5 Mich. 107.

Steele vs. Matteson, 50 Mich. 313, 15 N. W. 488.

Bardwell vs. Stubbert, 17 Neb. 485, 23 N. W. 344.

Palmer vs. Meiners, 17 Kan. 478.

Page vs. Fowler, 39 Cal. 412.

It is too plain for argument that this judgment that "the plaintiffs," i. e., the dead corporation and Pegram and Borglum, are jointly the owners of and entitled to the possession of all the property, cannot stand. The power to hold property ended with the life of the corporation.

3. Section 434 Remington's Code of Washington provides:

> "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or value thereof, in case a delivery cannot be had, and damages for the detention."

The only judgment that could be entered is one in conformity with the statute. Any other is unauthorized.

Edison vs. Woolery, 10 Wash. 225, 227.

National Bank vs. Meerwaldt, 8 Wash. 630.

Twohy vs. Linder, 144 Cal. 790, 793, 78 Pac. 233.

4. Section 431 of Remington's Code of Washington provides:

> "When a trial by jury has been had, judgment shall be entered by the clerk immediately in conformity to the verdict."

Independently of the statute, this is the fundamental rule.

> *Bennett vs. Butterworth,* 11 How. 670, 13 L. Ed. 859.
>
> *Swenson vs. Stoltz,* 36 Wash. 318.

The verdict (Record p. 34) finds that the plaintiffs are the owners of and entitled to the possession of "all of the property replevined by the marshal."

The judgment (Record p. 33) is that the plaintiffs are the owners of and entitled to the possession of "all of the property *replevined by the plaintiff* and seized by the marshal and now located," etc.

One of the definitions given by Webster's International Dictionary of the word "Replevied" is:

> "B To take or get back by a writ of replevin."

Now, "the plaintiff" never took, or got back, any property under the writ of replevin. The verdict did not find that it did so, and the judgment must follow the verdict. Being different from the verdict the judgment is bad.

> *Holliday vs. McKenzie,* 22 Fla. 153.
>
> *Leighton vs. Stewart,* 10 Neb. 224, 4 N. W. 1051.

Adding "and seized by the marshal" does not help the matter any. As we have heretofore shown, the marshal seized a large amount of property which

the plaintiff did not claim to own, or of which it had been denied possession.

5. The special verdict having found only upon two facts, viz, ownership and right of possession of the property "replevined by the marshal," which is not the property described in the complaint, and the findings are wholly outside the issues of the pleadings, this was equivalent to finding against the plaintiffs on every issue made by the pleadings, and plaintiff in error was entitled to judgment on the verdict.

Puterbaugh vs. Puterbaugh, 131 Ind. 288, 30 N. E. 519.

6. Not only does the judgment depart from the verdict in designating the property, but it is bad for uncertainty in that it wholly fails to describe the particular property sought to be recovered. In *National Bank vs. Meerwaldt,* 8 Wash. 630, 635, an action to recover possession of a certain warrant, the Court says:

> "A judgment in such cases should be for the recovery of the personal property the possession of which was sued for. * * * The judgment did not describe the warrant and was therefore deficient."

In order to give a judgment the merit and finality of an adjudication between the parties, it must be responsive not only to the proofs, but to the issues tendered by the pleadings.

The Hoppet vs. U. S., 7 Cranch 394, 3 L. Ed. 380.

Crockett vs. Lee, 7 Wheat. 522, 5 L. Ed. 513.
Reynolds vs. Stockton, 140 U. S. 254, 35 L. Ed. 464.

This because pleadings are the very foundation of judgments and decrees.

Charles vs. White, 214 Mo. 187, 112 S. W. 545.

The marshal's return shows that he seized approximately 39,000 negatives, 41 Volumes of "North American Indian," 2 packages of prints, and 1 volume of Indian Days of Long Ago, which were not mentioned in the pleadings.

The verdict in this case was a special one, and the judgment on such a verdict must be the logical conclusion from the facts found by the jury, unaided by the evidence, or any extrinsic matter, though apparent in the record.

Suydam vs. Williamson, 20 How. 427, 15 L. Ed. 978.
Rice vs. Evansville, 108 Ind. 7, 9 N. E. 139.
State vs. Hammer, 143 N. C. 177, 69 S. E. 771.

Furthermore, a judgment rendered on a special verdict which does not contain a finding by the jury either for, or against, all the material facts put in issue by the pleadings will be reversed.

Ward vs. Cochran, 150 U. S. 597, 37 L. Ed. 1195.

And this even if the question is raised for the first time in the appellate court.

Hickey vs. Breen, 40 Mont. 368, 106 Pac. 881.

7. In addition to the foregoing, the law is that the judgment in actions of this kind must be confined to matters properly arising in the action.

Marks vs. McGhem, 35 Ark. 217.

That the subject matter of litigation necessarily consists only of the property described in the complaint, and there can be neither verdict nor judgment as to property other than that.

Lovensohn vs. Wild, 45 Cal. 8.

Lindley vs. Miller, 67 Ill. 244.

After adjudging that "plaintiffs are the owners of and entitled to the possession of all the property replevined by the plaintiff and seized by the marshal and now located in Room 64 Cobb Buidling, * * save and except the following:" (Record p. 37) there follows a list of ten items of property described as in the verdict, and then the judgment proceeds: "which said excepted property the plaintiffs are hereby ordered to return to the Curtis Studio, the place whence it was seized, or—in the event of their failure so to do—that they pay to the defendants the sum of nine and 50/100 ($9.50) Dollars, the value of said property."

The verdict does not find who does own the excepted property, nor does it speak as to the place from whence the marshal took it. The marshal "swears" (Record p. 23) that he did not take any of it at all. Edward S. Curtis testfiied (Record p. 69) that he was familiar with the property which the marshal seized in the action, and that all of it so

seized belonged to the North American Indian, excepting eight of the ten items set out in the judgment. Two of the items, therefore, were as non-existent as the plaintiff corporation, and it was quite in harmony with the result of the case that the non-existent corporation should be given the option of returning the non-existent property to a non-entity, or paying strangers its unknown value and becoming the owner.

When it is recalled that the judgment cannot look beyond the findings of fact contained in the verdict to any other fact, even though it be apparent in the record, or proven by the evidence, the utter illegality of this judgment is at once evident.

A judgment is void which is a departure from the pleadings, and based upon a case not averred therein.

Evans vs. Gibson, 29 Mo. 223.

Waldron vs. Harvey, 54 W. Va. 608, 46 S. E. 603.

Metcalf vs. Hunt, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407.

Falls vs. Wright, 55 Ark. 562, 18 S. W. 1044.

The rule is firmly established that irrespective of what may be proved a court cannot decree to any plaintiff more than he claims in his pleadings.

Simms vs. Guthrie, 9 Cranch. 19, 3 L. Ed. 642.

People vs. Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693.

Respinir vs. Porta, 89 Cal. 464, 26 Pac. 967.

Lovenshon vs. Ward, 45 Cal. 8.

Lindley vs. Miller, 67 Ill. 244.
Gille vs. Emmons, 58 Kan. 118, 48 Pac. 569.
Charles vs. White, 214 Mo. 187, 112 S. W. 1040.

Viewed from every aspect this whole case from pretended demand to judgment is a palpable attempt to deprive plaintiff in error of her property without due process of law. To that end there was no hesitation in prostituting and abusing the process of law. Prohibited from removing the property from the Curtis Studio of which he was in possession pending the appeal, by an injunction which he could not supersede, Edward S. Curtis conceived and carried out the scheme of using the name of the dissolved corporation of which he owned all the issued stock, common and preferred, excepting six shares, in making a pretended demand on himself, and in bringing the action against himself, to accomplish his purpose of preventing plaintiff in error from coming into possession of that which had been given her in the decree of divorce. The judgment herein is the result. I submit that it should be reversed and remanded to the District Court with directions to abate the action as to the North American Indian, and dismiss it as to the additional plaintiffs Pegram and Borglum. Also, that plaintiff in error recover her costs against Pegram and Borglum in this court.

Respectfully submitted,

JOHN G. BARNES,
Attorney for Plaintiff in Error.